

Ely's Theory of Judicial Review: Preserving the Significance of the Political Process

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In the climate of doctrinaire rhetoric contaminating our political and moral discourse¹ and unfortunately our constitutional debating as well,² a prima facie indicium of truth may be an argument's ability to provoke simultaneously the wrath of the "left" and the "right."³ John Hart Ely's success in this regard⁴ is thus the first clue that he ought to be read and taken seriously. *Democracy and Distrust*⁵ indeed is a remarkable testament to reason and principle in constitutional theory, and we may expect accordingly the stream of critical review, which hardly waited for the book's umbilical cord to be cut, soon to become a deluge.⁶

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1. Diatribes about abortion, the equal rights amendment, affirmative action, and the draft are some obvious examples.

2. Awareness of this trend had a profound effect upon the constitutional theorizing of the late Alexander Bickel. Compare A. BICKEL, *THE MORALITY OF CONSENT* (1975), with A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). For a discussion of Bickel's change in political and constitutional philosophy, see Purcell, *Alexander M. Bickel and the Post-Realist Constitution*, 11 HARV. C.R.-C.L. L. REV. 521 (1976).

3. The terms "left" and "right," although neither precise nor all-encompassing, see J. ELY, *DEMOCRACY AND DISTRUST* 71-72 (1980) (describing Bickel as a political liberal but a judicial conservative), are nevertheless useful if their limitations are kept in mind. Whatever their meaning in politics, these terms in the present context respectively distinguish the advocates of judicial interventionism from those of judicial restraint, and they are especially useful as a shorthand tag for the extremists in both camps. See note 4 *infra*.

4. Compare Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979), with Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980). As the terms are defined in note 3, Berger is a quintessential example of the "right" and Tribe of the "left." See R. BERGER, *GOVERNMENT BY JUDICIARY* (1977) (criticizing the Supreme Court, especially in the fourteenth amendment context, for rendering decisions that violate the constitutional limits on its power); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 886-990 (1978) (arguing that the Supreme Court should define and give meaning to a substantive right of personhood); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (attempting to read the rather "conservative" decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), as constitutionally protecting legitimate expectations of basic governmental services).

5. J. ELY, *DEMOCRACY AND DISTRUST* (1980) [hereinafter cited as ELY].

6. For criticisms of the book, see Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980). Three chapters of the book were published with slight variations as law review articles in 1978, and this may account for the rather quick appearance in print of critical reviews. See generally Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 IND. L.J. 277 (1979), reacting even before publication of the book to Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978), an article that subsequently became chapters one and two in Ely's book.

The practice of publishing the same material twice but with minor variations can be rather annoying, especially to someone like myself who wants to read every word of an author like Ely. It turns out that the book both omits and adds material, thus forcing the reader to read both the articles and the book (almost simultaneously) to avoid missing anything. Compare Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399, 405-08 (1978) (connecting democracy and utilitarianism), with ELY, *supra* note 5, at 187 n.14 (explaining this omission from his book as unimportant); Ely, *Toward A Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 480-81 (1978) (describing the fourth amendment as evidencing a "process" concern), with ELY, *supra* note 5, at 96 (omitting this particular characterization of the fourth amendment's function).

Subtitled *A Theory of Judicial Review*, Ely's book attempts to justify the institution of judicial review in our democratic state. Any complete justification, of course, must touch on the proper scope of judicial review, for the questions of justification and scope are inextricably related.⁷ Ely's justification defines for the Supreme Court a much narrower role than perhaps a majority of present commentators will be able to stomach⁸—a role nevertheless too broad for the minority of strict constructionists, literalists, or what-have-you, who prefer to fight battles already lost.⁹ Because opinions about judicial review are held passionately and often uncompromisingly, the possibility exists that instead of receiving the studied examination it deserves, Ely's theory will encounter self-defending polemics. This would be unfortunate, for Ely's theory, although more promising than any other still extant, has holes that require attention. Whether they are critical only thorough debate will reveal.

The first section of this examination focuses on those parts of Ely's theory that require further attention. The second section considers Ely's attempt in the final two chapters of his five chapter book to apply his theory to specific constitutional issues. The application is hardly as satisfying as the pure, abstract theory, and this too may indicate that some further work on the latter is necessary.¹⁰ A concluding section defends the significance of *Democracy and Distrust*, even given its apparent flaws.

I.

The essence of Ely's theory can be summarized quickly. Several constitutional provisions are so open-ended that their meanings cannot be de-

7. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 34 (1962): "[I]t is one and the same inquiry to seek a justification for judicial review and an appreciation of the proper quality and reach of the process; the answers to the two halves of the inquiry determine each other."

8. The interventionists are many who want the Supreme Court to define values not found in the written constitution. See, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978); Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049 (1979); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Nowak, *Foreword—Due Process Methodology in the Postincorporation World*, 70 J. CRIM. L. & C. 397 (1979); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). If Ely is right in his approach, these authors—who are just a representative sampling of a much larger group—are dead wrong.

9. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY* 1-19 (1977), summarizing his argument that a strict "intent of the framers" approach proves that the fourteenth amendment should not have been applied to either suffrage or segregation. Even Berger appears to recognize the futility of this argument, for rather than call for the reversal of decades of Supreme Court cases, he contents himself with the admonition that the Court should sin no more. *Id.* at 412-13. For an intent of the Framers' approach that differs radically from Berger's, see A. BICKEL, *POLITICS AND THE WARREN COURT* 211-261 (1965) (arguing that the Framers chose fourteenth amendment language sufficiently elastic to permit future advances).

10. See Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1080 (1980), criticizing Ely for not analyzing what the acceptance of his views would actually do to constitutional law. For a scare-tactics approach, making use of a parade of horrors that allegedly would result from a theory such as Ely's, see Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

It may be that Ely's once-held concern that his theory might leave too little room for "civil liberties" protections prompted some dubious applications to blunt the sting of his interventionist critics. See ELY, *supra* note 5, at 102 n.*.

terminated by reference to text or history. Courts and most commentators usually attempt to define these open-ended provisions by reference to fundamental values discovered in such places as natural law, tradition, or contemporary morality. Each possible source of fundamental values confronts fatal theoretical and practical difficulties, the result being that each only masks the court's or the commentator's imposition of personal values on society. Because this is unacceptable in a representative democracy, an alternative model for judicial enforcement of these open-ended provisions must be developed, and if this cannot be done we must consider seriously the possibility that courts should simply stay away from them.¹¹ Fortunately, an alternative approach can be developed, one that is "participation-oriented" and "representation-reinforcing."¹² The Supreme Court's function under this approach is both to keep open the channels of political change and to correct improper discriminations against certain minority groups.¹³ These twin concerns assure broadened access to the processes and bounty of representative government. Thus, unlike the fundamental values approach, the representation-reinforcing approach "is not inconsistent with, but on the contrary is entirely supportive of, the American system of representative democracy."¹⁴

The theory is intuitively convincing, but almost every aspect of it is sure to be challenged. Some, for example, will deny that the Constitution contains open-ended provisions and, like the late Justice Black, will insist on a pure interpretivist approach to the Constitution.¹⁵ Ely appropriately begins his analysis by discussing the allure and impossibility of a clause-bound interpretivism—a doctrine, as defined by Ely, which insists "that the work of the political branches is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution."¹⁶ After observing that the interpretivist approach reflects the "will of the people" only if one has in mind people who have long been dead,¹⁷ Ely attempts a serious defense of his argument by considering several provisions so "open-textured" that their invitation to take a non interpretivist approach

11. ELY, *supra* note 5, at 41. Ely does not appear to have taken seriously the latter option. See text at note 127 *infra*.

12. ELY, *supra* note 5, at 87.

13. Ely's theory develops dicta written by Justice Stone in one of the most famous footnotes in constitutional law. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). Ely does not develop the first paragraph of the footnote, which suggests strict judicial scrutiny may be appropriate when legislation appears to conflict with a specific prohibition of the Constitution. Justice Stone added this paragraph to the footnote to win the support of Chief Justice Hughes. See L. LUSKY, *BY WHAT RIGHT?* 108-11 (1975).

14. ELY, *supra* note 5, at 101-02.

15. Ely scores a telling point against Justice Black by observing that if the Constitution itself has provisions instructing us to look beyond their four corners, a strict interpretivist must be willing to abide by such instructions. *Id.* at 38.

16. *Id.* at 1-2.

17. *Id.* at 11. Ely is attempting to answer the argument that interpretivism is the theory most consistent with democratic principles because it requires the judiciary to rely on principles affirmed by the people. Cf. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 27-28, 108-09 (1962) (arguing that democracy's most essential attribute, "the consent of the governed," precludes any principle, even an historically rooted one, from having permanent validity).

cannot be construed away.¹⁸ He includes in his list the first amendment, the eighth amendment's cruel and unusual punishment clause, the ninth amendment, and the fourteenth amendment's privileges or immunities and equal protection clauses.

Ely's omission of the fourteenth amendment's due process clause is deliberate. Insisting that the Framers' intent cannot be ignored, because something not ratified is not part of the Constitution,¹⁹ Ely argues that "the most important datum bearing on what was intended is the constitutional language itself."²⁰ The language indicates that the due process clause was meant to have procedural meaning only.²¹ Ely concedes that some Framers may have had a substantive meaning in mind as well, but in interpreting a constitution the intent of the ratifiers cannot be taken as less crucial, and the only reliable evidence of the ratifiers' intent, here and usually elsewhere, is the language they approved.²²

The votaries of substantive due process, such as Professor Tribe, are certain to find all sorts of problems with this analysis,²³ but Ely's point is nevertheless convincing. The unsatisfactory part comes when Ely turns to the fourteenth amendment's command that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United states." To Ely, "[this provision] seems on its face to convey the sort of substantive review authority that has erroneously been attributed to the Due Process Clause."²⁴ This has to cause raised eyebrows, for the Constitution's other privileges and immunities clause²⁵ had, as Ely recognizes, never been interpreted as conveying substantive rights, but instead had been viewed as requiring a state to treat equally, at least on certain matters, its own citizens and those of other states.²⁶ Ely argues, however, that because the equal protection clause is concerned with equality, the privileges or immunities clause of the fourteenth amendment must, if it is not to be redundant, mean something more. As Ely reads the language, "it seems to announce rather plainly that there is a set of entitlements that no state is to take away."²⁷ Aside from his redundancy point, Ely relies only on a dissenting opinion in an early United States Supreme Court case²⁸ and on the view that during the mid-nineteenth century "notions of equality and substantive entitlement tended to

18. ELY, *supra* note 5, at 13.

19. *Id.* at 16.

20. *Id.*

21. *Contra*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980) (arguing that the word "law" in "due process of law" was the "textual point of departure for substantive due process").

22. ELY, *supra* note 5, at 17.

23. *See* note 21 *supra*.

24. ELY, *supra* note 5, at 22.

25. U.S. CONST. art. IV, § 2, cl. 1.

26. ELY, *supra* note 5, at 193-94 n.45.

27. *Id.* at 24.

28. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 104-05 (1872) (Field, J., dissenting).

merge."²⁹ After insisting so adamantly on the primacy of language with respect to the due process clause, Ely's strained attempt to read substantive content into the privileges or immunities clause seems conspicuous.

Ely's trouble with the language of the fourteenth amendment's privileges or immunities clause does not end there. Even assuming that the clause has substantive content, it seems to protect not all persons but only citizens. Ely requests us to take a second look at the language, for the first and natural reading, which limits the provision's protection to citizens, "is out of accord with what we are quite certain was the purpose."³⁰ Ely's second reading leads him to conclude that the states cannot deny to any person those privileges that belong to United States citizens.³¹ Besides again straining the language, Ely leaves unanswered the source of our "certain" knowledge of the Framers' (not to mention the ratifiers') purpose.

More is involved here than some quibbling over Ely's interpretation of one clause in the Constitution. It turns out that Ely's interpretation of the privileges or immunities clause is critical to his entire theory, for with due process eliminated, only the privileges or immunities clause provides the basis for any substantive review of state legislation. First amendment principles, for example, which loom as the strongest protection for keeping the channels of political change open, cannot apply to the states unless something in the fourteenth amendment provides substantive review.³² The due process clause, if given only a procedural meaning, is not available for application of such substantive protections; the equal protection clause obviously has no bearing; so privileges or immunities is the only thing left.

Not surprisingly, Ely revives Justice Black's moribund "incorporation" theory, which maintained that the fourteenth amendment applied the Bill of Rights to the states.³³ This theory, of course, avoided the necessity of describing first amendment protections, and select other Bill of Rights protections, as "fundamental." Ely relies for support on statements by Congressman Bingham and Senator Howard,³⁴ but given his previously expressed disinclination to base an interpretation merely on the intentions of some Framers,³⁵ he cannot, as he recognizes, get too much mileage here. Turning to language again, Ely concedes that a conceptual difficulty is present, for if privileges or immunities refers to everything in the Bill of Rights, it necessarily refers to

29. ELY, *supra* note 5, at 24.

30. *Id.* at 25.

31. *Id.* ("In other words, the reference to citizens may define the class of rights rather than limit the class of beneficiaries.").

32. The first amendment's protection of speech was one of the first Bill of Rights provisions applied to the states, and the mode of analysis was clearly that of substantive due process. *See, e.g.,* *Whitney v. California*, 274 U.S. 357 (1927); *Gitlow v. New York*, 268 U.S. 652 (1925).

33. For a summary statement by Justice Black of the position he advocated during his tenure on the Court, *see* *Duncan v. Louisiana*, 391 U.S. 145, 162-71 (1968) (Black, J., concurring).

34. ELY, *supra* note 5, at 25-27. Ely was not prepared, however, to limit the clause's function to that of incorporating the Bill of Rights. *Id.* at 28.

35. *See* text accompanying note 22 *supra*.

the fifth amendment's due process clause, and on such an incorporationist reading the fourteenth amendment's due process clause becomes superfluous.³⁶ Undaunted, Ely continues:

It [this observation] does not, however, greatly damage what by now should have emerged as the more sensible formulation, that although the ratified language does not compel the conclusion that the provisions of the Bill of Rights were "henceforth" to be counted among the privileges and immunities of citizens, there is at the same time nothing in the language (or what we know of its surrounding intentions) that should preclude our arriving at that result.³⁷

What happened to the notion that something not ratified cannot be part of the Constitution?³⁸

Ely's too apparent disregard of rigor with respect to the privileges or immunities clause resulted from an intractable dilemma. If he relied seriously and consistently on the interpretivist-language approach he had applied to the due process clause, he would have eliminated not only substantive due process, which he wanted to do, but perhaps application of the Bill of Rights to the states, which he did not want to do. In addition, he may have eliminated even the possibility of an open-ended substantive protection from the privileges or immunities clause, thus making his general representation-reinforcing theory totally inapplicable to the states. These ramifications were too much for a civil libertarian like Ely. Such purism, moreover, would have required

36. ELY, *supra* note 5, at 27.

37. *Id.*

38. See note 19 and accompanying text *supra*. The question of the Framers' intentions can be quite tricky. The easiest case involves a situation the Framers actually intended to be covered by their language. More typical, however, are cases involving situations which the Framers did not think about at all, and the question is whether the situation at issue falls within the purpose, broadly conceived, that the Framers had in mind. Most difficult, perhaps, are situations arguably covered by the constitutional language but intended by the Framers not to be covered. In recent times, the school desegregation issue has highlighted this problem of defining what we mean by the "Framers' intentions." Almost everyone agrees that the Framers did not mean to outlaw segregated schools, but whether they left the issue open or actually meant to immunize segregation from the fourteenth amendment's reach has caused considerable debate. See note 9 *supra*. Even if the Framers meant to exclude segregation from the amendment's reach, the significance of that "intent" would be difficult to ascertain. See P. BREST, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 157-61 (1975).

Ely argues that the language of the privileges or immunities clause neither compels nor precludes incorporation of the Bill of Rights. Yet he asserts that the language of the due process clause does preclude us from giving it substantive content, the thoughts of a few Framers to the contrary notwithstanding. Unless, however, the Framers meant to preclude substantive content, the most Ely can be saying is that the purpose of the clause, even broadly conceived, cannot be taken as extending to substantive review. Limiting ourselves to language, however, the broad purpose of the due process clause seems only slightly more apparent than does the purpose of the privileges or immunities clause.

Perhaps Ely's difficulty arises from his primary reliance on language. The meaning of words even seemingly clear on their face can be determined only from their usage, and for this one must look to the goals the user aimed to further. See Wittgenstein, *Philosophical Investigations* §§ 65-72, in M. WHITE, *THE AGE OF ANALYSIS: 20TH CENTURY PHILOSOPHERS* 230-34 (1955). Perhaps the best example in constitutional law is *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in which Chief Justice Marshall convincingly demonstrated that the word "necessary" in the necessary and proper clause could only have been used as meaning "convenient" or "conducive to." Of course, a plain or ordinary meaning approach may be more appropriate if we are seeking to determine what the ratifiers, rather than the Framers, had in mind, unless, of course, the Framers at the time sought to convey their meaning through publicity. In any event, it strains credulity to argue that the ratifiers of the privileges or immunities clause, in contrast to the Framers, had in mind a purpose broad enough to encompass incorporation of the Bill of Rights.

Ely to choose between calling for the overruling of decades of precedent or admonishing the Court, as Professor Berger recently did,³⁹ simply to sin no more. Either choice would have left his book interesting but basically unimportant for the real world.⁴⁰ Thus the irresistible urge to fudge, to make it all come out the way it basically is and the way we like it. But if fudging is permissible to produce "good," one must be entitled to ask why the fudging of Professor Tribe and the other "fundamental values" theorists is impermissible.⁴¹ Perhaps the answer is that Ely's fudging is more consistent with democratic theory, but once fudging enters the picture, the argument loses some (but not all) of its force. Ely's followers—and I put myself in his camp—have cause to regret that this section of the book is not as convincing as we are tempted to assert it is.

As the above paragraphs demonstrate, attacking a theory is easier than constructing one, and Ely is at his best in arguing that fundamental values cannot be "discovered" outside the Constitution.⁴² Ely reminds us that natural law, for example, has been used to support almost everything, including arguments both for retaining and abolishing slavery and for constraining and liberating women. Moreover, "the only propositions with a prayer of passing themselves off as 'natural law' are those so uselessly vague that no one will notice."⁴³ Ely shows that reason likewise is not an acceptable source of fundamental values, first, because reason technically can only connect premises to conclusions, and, second, because judges with their upper middle-class biases are no more qualified than the people's representatives to identify basic premises.⁴⁴ In any event, correct moral reasoning is a matter of dispute, and the case has not been made for having judges, in the name of the Constitution, impose one rather than another philosophical school on the country: It simply will not do to have the Supreme Court say, "We like Rawls, you like Nozick. We win, 6-3."⁴⁵ Tradition and contemporary morality run into similar difficulties as sources of fundamental values, but tradition has the added theoretical problem of relying on the past to define the meaning of open-ended provisions—provisions that were meant to invite growth, and contemporary morality has the added theoretical problem of leaving disfavored minorities unprotected.⁴⁶ Majorities need not rely on contemporary morality for protection.

39. See note 9 *supra*.

40. For the view that some constitutional interpretations may be too embedded now to warrant correction even by Supreme Court Justices, see Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 7 (1979).

41. It should be recalled that Alexander Bickel deduced support for a value-laden model of judicial review from "a moral judgment of the good society." A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24 (1962).

42. Chapter 3 of the book is a slight variation of Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978).

43. ELY, *supra* note 5, at 51.

44. *Id.* at 56-60.

45. *Id.* at 58.

46. *Id.* at 60-69. Ely systematically treats natural law, neutral principles, reason, tradition, consensus, and progress as possible sources of fundamental values.

Ely's chapter on the deficiencies inherent in fundamental values theories is so convincing that, using Professor Tribe's word, one must be "puzzled" at the opposition it has engendered and will continue to engender.⁴⁷ Ely's argument that any theory of "fundamental values" inevitably boils down to imposition of the judges' own personal values is careful, thorough, and difficult (I'm tempted to say impossible) to rebut, and yet, even with a Court that many interventionist commentators do not trust, the literature overflows with arguments that the Court should "discover" such values.⁴⁸ The puzzlement may perhaps be overcome, however, by recognizing that the fundamental values approach is today basically a one-way ratchet. Professor Tribe can argue, for example, that zoning laws prohibiting groups of unrelated individuals from living under one roof are unconstitutional because they "defeat the self-defining, value-forming, and power-amassing efforts of all but the more standard social groupings,"⁴⁹ and if a "conservative" Court rejects such an argument—as any *court* should—all that results is the preservation of the status quo, and the battle can always be fought again tomorrow. If a legislature, however, adopted Tribe's zoning philosophy, it would be virtually impossible under any constitutional theory now known for a person to argue to a court that he was constitutionally entitled to more restrictive zoning. Similarly, no person could argue that he was constitutionally entitled to have the state ban contraceptives, criminalize marijuana, prohibit pornography, or outlaw homosexual behavior.⁵⁰ Thus, the advocates of a fundamental values approach rarely can lose; they start with two forums to advance their politics while their political opposition has only one, and at worst they gain nothing while at best they win a change they cannot accomplish politically. No wonder that no amount of reason, from Ely or anyone else, can make those people recant!

Having devastated the fundamental values approach, Ely still had the task of demonstrating that his "participation-oriented, representation-reinforcing" approach to judicial review was constitutionally acceptable. Ely makes three arguments. He first attempts to show that the Constitution itself demonstrates little concern with substantive values but instead focuses both on procedural fairness in individual disputes and on "ensuring broad partici-

47. Cf. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

48. See authority collected in note 8 *supra*.

49. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1078 (1980).

50. Of course, when the legislature is in the forefront of "reform," anti-reform courts can use the fundamental values approach as an obstacle. That, after all, is what *Lochner v. New York*, 198 U.S. 45 (1905), and its progeny were about. The reality today, however, is that legislators are much less in the forefront (ergo, the great reliance on courts by "liberals"). Equally important, rights of "personhood" impinge on majority control but not usually on other individual rights. Thus, a law that permits me to use contraceptives or to smoke dope in my home does not invade a personal right of any prospective complainant. Of course, there may be exceptions. Laws permitting abortions, for example, conceivably could be viewed as infringing upon a right to life or a father's right to have a child. See, e.g., Jonas & Gorbey, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MAR. J. PRAC. & PROC. 551 (1976).

pation in the processes and distributions of government."⁵¹ His argument is "by way of *ejusdem generis*," an approach that seems "particularly justified" since the open-ended provisions, such as the ninth amendment and the privileges or immunities clause, seem based on the fear that the Framers may have missed something in the other provisions.⁵²

Ely never maintains that the Constitution is devoid of substantive provisions; rather, he makes the more limited assertion that the Constitution is primarily concerned with structure and process.⁵³ Ely tries nevertheless to interpret most of the Bill of Rights provisions as process oriented. Here again he gets into trouble. The expression-related provisions of the first amendment fit his theory neatly, but the religion clauses are troublesome, and he concedes that the free exercise clause is explained, but only in part, by the importance of religion as a substantive value to the Framers.⁵⁴ Ely argues that the third amendment, forbidding nonconsensual peacetime quartering of troops, is partly concerned with structure—a separation of powers concern about limiting military influence—but he also concedes that this provision reflects a substantive value of privacy.⁵⁵

Ely tries to dismiss most of the provisions in amendments five through eight as concerned only with procedures during lawsuits, but he concedes that the fifth amendment's protection against compulsory self-incrimination reflects the notion that there is something immoral—"though it has proved tricky pinning down exactly what it is"—about seeking answers from a suspect.⁵⁶ Here, perhaps, a little sloppiness causes Ely to concede more than he should, for he cites a 1961 Supreme Court case concerning state-coerced confessions.⁵⁷ In 1961, however, the Court was relying on the fourteenth amendment's due process clause in state confession cases; the fifth amendment had not yet been applied to the states.⁵⁸ Of course, *Miranda v. Arizona*⁵⁹ not only applied the fifth amendment to state police interrogation—a position Wigmore had argued was dead wrong⁶⁰—but also adopted a philosophical approach to that amendment like the one Ely describes. Ely apparently saw no reason to challenge *Miranda*, which if done plausibly would have made a case for

51. ELY, *supra* note 5, at 87.

52. *Id.*

53. *Id.* at 92. Given Ely's concession, one must wonder what Professor Tribe gains by emphasizing the substantive content in constitutional provisions Ely readily yields to him. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065-67 (1980).

54. ELY, *supra* note 5, at 94.

55. *Id.* at 95.

56. *Id.* at 95-96.

57. *Rogers v. Richmond*, 365 U.S. 534 (1961), cited in ELY, *supra* note 5, at 227 n.79.

58. The Court "incorporated" the fifth amendment's compulsory self-incrimination clause in *Malloy v. Hogan*, 378 U.S. 1 (1964). The Court had relied on the fifth amendment in federal confessions cases, *see, e.g.*, *Bram v. United States*, 168 U.S. 532 (1897), but the cases were few and the point was basically lost since even in these cases the Court applied a due process totality of circumstances test. *See, e.g.*, *United States v. Carignan*, 342 U.S. 36 (1951).

59. 384 U.S. 436 (1966).

60. 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 823 at 250 n.5 (3d ed. 1940).

keeping the self-incrimination clause more in the process column.⁶¹ The methodological difficulty is apparent: Ely had to choose between taking some provisions as their text and history suggest they should have been taken or instead taking the provisions as the Court has interpreted them. If he had argued that the Court has erred in interpreting Bill of Rights provisions, he would have risked losing his readers' support for his overall theory, but by deferring to the Court's interpretations, he was forced to concede more value imposition than would otherwise have been necessary.⁶² Indeed, he should have conceded even more. For example, the sixth amendment right to counsel in the context of police interrogation has come—although arguably incorrectly—to represent the value that taking advantage of an unrepresented suspect is somehow morally wrong.⁶³

The fourth amendment gave Ely considerable trouble. Conceding that it protects privacy, he argues that it does much more. The warrant requirement, he maintains, "can be seen as another harbinger of the Equal Protection Clause, concerned with avoiding indefensible inequities in treatment."⁶⁴ This one cannot be permitted to go by. First, the fourth amendment does not by its language *require* warrants;⁶⁵ that has been judicial gloss, and some scholarship has suggested it was wrong.⁶⁶ Second, Ely leaves unanswered where we are left with the fourth amendment. Although its protections sometimes have nothing to do with privacy—the single sentence Ely quotes from a Supreme Court opinion is not that convincing⁶⁷—it cannot be denied by any serious fourth amendment student that privacy—at least a certain kind of privacy⁶⁸—is today the primary thrust of fourth amendment protection.⁶⁹

Ely next simply asserts that the eighth amendment's cruel and unusual punishment clause was partly based on the realization that there is tremendous potential for the arbitrary infliction of "'unusually' severe punishments on persons of various classes other than 'our own.'"⁷⁰ It will take more than this to convince skeptics that the eighth amendment is a miniature equal

61. *Miranda* can be challenged for reasons that fit comfortably, if not perfectly, within Ely's theory of constitutional interpretation. See Grano, *Voluntariness, Free Will and the Law of Confessions*, 65 VA. L. REV. 859, 926-37 (1979).

62. On the problem of accommodating precedent, see note 40 and accompanying text *supra*.

63. See generally, Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1 (1979).

64. ELY, *supra* note 5, at 97.

65. The relevant language is, "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

66. T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 44-46 (1969).

67. ELY, *supra* note 5, at 96, quoting *Katz v. United States*, 389 U.S. 347, 350 (1967). *Katz* has come to be understood as defining a fourth amendment "search" as police activity that invades a "reasonable expectation of privacy." A cursory review of the case law indicates that courts are preoccupied with searches, not seizures; thus, they are preoccupied with privacy.

68. The fourth amendment protects informational privacy. ELY, *supra* note 5, at 228 n.82. See also Grano, *Foreword, Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & C. 425, 428-44 (1978).

69. See note 67 *supra*.

70. ELY, *supra* note 5, at 97.

protection clause. Similarly, Ely's equal protection view of the fifth amendment's just compensation clause is hardly the only one available.⁷¹

Ely's attention to the Bill of Rights has been belabored here because, upon reflection, it seems so critical to his theory. If in fact there is not only as much of substantive value in the first eight amendments as Ely concedes but perhaps even more, and if *ejusdem generis* is "particularly justified" in interpreting the ninth amendment, then Ely has not only failed to make his case, he has made the opposition's: The ninth amendment may be seen as protecting substantive values that the Framers left out of the first eight amendments. By Ely's interpretation of the privileges or immunities clause, the ninth amendment should be equally applicable to the states, thus making the fundamental values approach appropriate in both state and federal cases.

It is bewildering that Ely did not see the weakness in his *ejusdem generis* approach. This, however, was only the first of his three arguments. When he initially introduced the other two arguments, he described them as "not less important" than the first.⁷² When he had finished his first argument, however, Ely was ready to concede that he had not proved very much: "[T]he premise of the argument, that aids to construing the more open-ended provisions are appropriately found in the nature of the surrounding document . . . is not one with which it is impossible to disagree."⁷³ Ely now described his other two arguments as perhaps "more important" than the first.⁷⁴

The first of the remaining two arguments is simply that the representation-reinforcing orientation is supportive of the American system of representative democracy, because it seeks to insure that elected representatives will actually represent.⁷⁵ One paragraph addresses this argument, although Ely claims the argument is obvious from his previous discussion. Seeing a possibility of circularity in his claim—"my approach is more consistent with representative democracy because that's the way it was planned,"⁷⁶—Ely counters that this is no more circular than setting out to build an airplane and ending up with something that flies.⁷⁷ This is hardly satisfactory. Whatever one may think of Alexander Bickel's fundamental values approach, he took great pains attempting to show that it was fully consistent with democratic theory,⁷⁸ and although Ely's assertion may be more accurate, we have cause to regret that he treated it so casually.⁷⁹

71. Compare *id.* at 97-98, with B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977) (setting forth various ways of approaching the just compensation clause).

72. ELY, *supra* note 5, at 88.

73. *Id.* at 101.

74. *Id.*

75. *Id.* at 101-02.

76. *Id.* at 102.

77. *Id.*

78. A. BICKEL, *THE LEAST DANGEROUS BRANCH* 1-28 (1962).

79. The first difficulty, of course, is that disagreement may exist over the essential characteristics of democracies in general and our democracy in particular. See notes 98-102 and accompanying text *infra*. In any event, Ely's critics are certain to attack his assertion. See, e.g., Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1047-48 (1980), arguing, first, that

Ely's final argument is more convincingly made. While judges are not better able than legislators, or anyone else perhaps, to articulate society's fundamental values, they are particularly well-suited to deal with process. Moreover, elected representatives, who have much to gain from closing the political process to change and who can easily disadvantage a minority to which they do not belong, "are the last persons we should trust with identification of either of these situations."⁸⁰ Whether Ely's competence argument can make up for the deficiencies in his other two arguments remains to be seen.⁸¹

II.

First amendment freedoms of expression and the right to vote are the linchpins of that aspect of Ely's theory concerned with keeping the channels of political change open. On its face, the first amendment restricts only Congress; it does not restrict the President, administrative officers, or courts.⁸² In applying this amendment, however, Ely is not content to rely on language or history: "It requires a theory to get us where the Court has gone," and that theory has been that such rights must be strenuously protected, even if not explicitly mentioned, "because they are critical to the functioning of an open and effective democratic process."⁸³

We want to agree, but the analysis is curious. Ely's general theory is designed to aid courts in applying open-ended provisions.⁸⁴ While the concept of freedom of speech may be open-ended, the specific addressee of the amendment—Congress—is anything but open-ended. If Ely is now suggesting that courts can properly use his constitutional theory to make elastic even specific constitutional provisions, his theory is much more "noninterpretivist" than his abstract discussion led us to believe. Of course, Ely could have achieved the same result by relying directly on the ninth amendment and the fourteenth amendment's privileges or immunities clause, but this would have been somewhat untidy given the specific concern of the first amendment with

empirical evidence has not shown that Americans embrace participatory democracy more than justice and, second, that democracies can function with low rates of participation. Tushnet is thus left bewildered by Ely's claim that his theory is "supportive of" representative democracy.

80. ELY, *supra* note 5, at 102-04.

81. *But cf.* A. BICKEL, *THE LEAST DANGEROUS BRANCH* 25-26 (1962) (emphasis added):

Moreover, and more importantly, courts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in *sorting out the enduring values of a society*. . . .

82. U.S. CONST. amend. I.

83. ELY, *supra* note 5, at 105.

84. See note 11 and accompanying text *supra*. Ely hedges on this somewhat. In one of the few footnotes included with the text rather than placed at the end of the book, Ely claims that a "Constitution is not divided into two sets of provisions, precise and open-ended." ELY, *supra* note 5, at 41 n.*. If, however, almost all constitutional provisions are open-ended, the choice Ely is giving us is not one between fundamental values, participation, or judicial avoidance of open-ended provisions; rather, it is a choice between fundamental values, participation-orientation, or the total elimination of judicial review. This latter "choice" unfairly stacks the deck favor of Ely's theory.

speech. Ely's general theory clearly mandates the broadest possible protection for speech, but Ely does not make clear how his theory justifies the liberties he proposes to take with the constitutional language.⁸⁵

In contrast to the above, Ely successfully draws upon his theory to develop insightful and sophisticated recommendations concerning permissible restraints on speech. Ely argues that the first amendment cannot perform "its central function of assuring an open political dialogue and process" if danger can be readily attributed to the content of a speaker's message.⁸⁶ Balancing tests, including the clear and present danger test, allow too much leeway in this regard, but an approach that designates "clearly and narrowly bounded" categories of expression not entitled to protection fares much better.⁸⁷ Of course, even this approach can be manipulated, but Ely argues that "manipulability" and "infinite manipulability" are not the same thing.⁸⁸ Ely contrasts, however, situations in which the state is seeking to avert an evil independent of the message being regulated—in which, that is, the evil arises from something other than the fear of how people will react to the speaker's message.⁸⁹ Here, there is no avoiding attention to context and "assessment of the particular threat posed by the communication in issue."⁹⁰ In a footnote, Ely explains that his dichotomous approach is not equivalent to one that distinguishes regulations of content from regulations of time, place, and manner.⁹¹ Ely observes that regulations of the latter often arise out of concern about the public's reaction to the particular message, and when this is so the stricter approach should be followed. Although Ely's discussion is necessarily abbreviated, it adequately illustrates how his constitutional theory can generate specific principles for application in concrete cases.

Quite understandably, Ely's participation-oriented theory also generates strict judicial review for restrictions on the right to vote, a right that Ely seems inclined to locate in article IV's guarantee clause.⁹² Ely draws particular support from this clause for the one person-one vote principle: "Discussions of the meaning of 'democracy' . . . seem invariably to include political equality, or the principle that everyone's vote is to count for the same, in their core definition."⁹³ Ely concedes that the guarantee clause does not define a "Republican Form of Government," and he also concedes that many Framers did not hold his view of the clause, but he suggests, nevertheless, that the clause should be viewed as one of the open-ended provisions in the Constitution.⁹⁴

85. Ely's emphasis on language when interpreting the due process clause should be recalled here. See notes 19–20 and 38 and accompanying text *supra*.

86. ELY, *supra* note 5, at 112.

87. *Id.*

88. *Id.*

89. *Id.* at 110–11.

90. *Id.* at 111.

91. *Id.* at 231–32 n.16.

92. U.S. CONST. art. IV, § 4, reads in part, "The United States shall guarantee to every State in this Union a Republican Form of Government"

93. ELY, *supra* note 5, at 122.

94. *Id.* at 123.

Finding no inconsistency between the one person-one vote principle and the Framers' intentions, Ely draws positive support for his position from the several amendments to the Constitution that have extended the franchise.⁹⁵ Of course malapportionment does not involve the denial of voting rights, but Ely responds that valuing one vote less than another "undercuts the commitment this constitutional development reflects."⁹⁶

Ely's discussion of the one person-one vote principle raises serious questions about the application of his theory. First, as already mentioned, Ely again leaves uncertain whether his theory is to guide interpretation of a few open-ended provisions or instead is to justify a "line of growth" for any constitutional provision onto which a court can conveniently latch.⁹⁷ More fundamentally, Ely leaves a gap between the premise of his theory and the ultimate conclusion in the malapportionment cases. Perhaps nothing besides segregation so provoked the ire of Alexander Bickel as the one person-one vote principle, and his several discussions of this topic warrant re-reading. Anticipating Ely, Bickel argued:

In such cases, it is often argued, there is no conflict with democratic theory, since the Court enhances, rather than derogating from, the democratic process. But the argument is question begging. With respect to the apportionment problem, the question whether one or another method of constructing a legislative institution is more democratic is the very question for decision. A simplistically populist answer begs it, and is in itself incomplete. . . . The issue then is one of the distribution of access and power among various groups, and the answer requires normative choices and prophetic judgments⁹⁸

Even before his alleged rightward drift, Bickel wrote:

[T]he heart of democratic government, and the morality which distinguishes it from everything else, is that it rests on consent. And the secret of consent is only in part a matter of control, of the reserve power of a majority to rise up against decisions that displease it. It is, perhaps more importantly, the sense shared by all that their interests were spoken for in the decisionmaking process, no matter how the result turned out. . . . This means that the institutions must not merely represent a numerical majority, which is a shifting and uncertain quantity anyway, but must reflect the people in all their diversity, so that all the people may feel that their particular interests and even prejudices, that all their diverse characteristics, were brought to bear on the decision-making process.⁹⁹

95. *Id.* To Ely, these amendments extending the franchise reflect a growing commitment to the principle "that all qualified citizens are to play a role in the making of public decisions."

96. *Id.*

97. See note 84 and accompanying text *supra*. It should be noted that the Supreme Court never could bring itself to see the relevance of the guarantee clause to the malapportionment issue and instead relied on the equal protection clause. See *Baker v. Carr*, 369 U.S. 186 (1962). By relying on the guarantee clause, Ely was able to avoid the question whether strict or deferential scrutiny was in order for equal protection purposes. ELY, *supra* note 5, at 121.

98. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 34-35 (2d ed. 1978).

99. A. BICKEL, *POLITICS AND THE WARREN COURT* 184 (1965). See also A. BICKEL, *THE LEAST DANGEROUS BRANCH* 192-97 (1962).

Ely, who goes to some length to discuss Bickel's odyssey with fundamental values methodologies,¹⁰⁰ virtually ignores Bickel here.¹⁰¹ Unfortunately, Ely leaves the impression that the fundamental values theorists may have a point after all. The Constitution certainly does not answer the debate between Bickel's Madisonian democracy and Ely's majoritarianism democracy, and as Bickel demonstrated so well, an answer cannot be provided syllogistically even if one starts with Ely's "participation-oriented" and "representation-reinforcing" premises. Ely cannot arrive at his conclusions without assuming, perhaps subliminally, that majoritarianism is a fundamental good, and such a normative evaluation is exactly what he promised to avoid.¹⁰²

Ely's discussion of the equal protection clause is long and complex, and only some of the highlights can be touched on here. Given the original purpose of the fourteenth amendment, Ely is willing to recognize that "only those classifications that are 'race like' in some relevant sense" should be treated like race for equal protection purposes.¹⁰³ Justice Stone's "discrete and insular minorities" approach is a starting point,¹⁰⁴ but Ely correctly observes that any minority that loses a legislative battle can be viewed as discrete and insular. Justice Stone, however, had in mind "those groups in society to whose needs and wishes elected officials have no apparent interest in attending,"¹⁰⁵ those minorities for whom the typical pluralist wheeling and dealing "will prove recurrently unavailing."¹⁰⁶ One person-one vote is not a sufficient safeguard here, and only the judiciary can adequately assure that such minorities have their interests taken into account.¹⁰⁷

This is the general constitutional theory; the difficult part is translating this theory into working equal protection principles. Ely has problems here, again demonstrating that the workability of his theory is not all that obvious. Whatever their past situation, blacks today, as Ely recognizes, have become

100. ELY, *supra* note 5, at 71-72. The attention is appropriate because, as Ely observes, Bickel spent his career seeking to accommodate the tensions between democratic theory and his theory that courts must sometimes check the legislative branches by relying on enduring, fundamental values. Although Ely basically contends that Bickel spent his life trying to answer the wrong questions, the section addressed specifically to him is a fitting tribute to a deserving giant.

101. Ely mentions Bickel specifically only in footnotes. See *id.* at 238 n.55, 239 n.60.

102. Ely attempts to justify the one person-one vote principle as the least intrusive substantive principle. *Id.* at 124-25. That is, while other principles may be consistent with democracy, they necessarily would be more complex and result in more judicial intervention. Ely's cite to *Miranda v. Arizona*, 384 U.S. 436 (1966), is appropriate in defense of a "prophylactic" approach, but he never discusses the constitutional legitimacy of such prophylactic rules. See generally, Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975), cited in ELY, *supra* note 5, at 239 n.65.

Ely has an interesting section, not discussed in the text of this review, calling for the disinterment of the nondelegation doctrine. *Id.* at 131-34. The reader may wonder how the Court can impose this doctrine as constitutional law on the states, but Ely in a footnote has no trouble finding support in the guarantee clause! *Id.* at 240 n.78.

103. *Id.* at 149.

104. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938). See note 13 *supra*.

105. ELY, *supra* note 5, at 151.

106. *Id.*

107. *Id.* at 135.

able to wheel and deal in the political arena,¹⁰⁸ but Ely is not willing to concede that the day has come when we can disregard the equal protection clause's core purpose: "A theory that excludes blacks from its protection, as one geared exclusively to political insularity seems to, is at least in need of some reexamination."¹⁰⁹

The missing element for Ely is prejudice: "The doctrine of suspect classifications is a roundabout way of uncovering official attempts to inflict inequality for its own sake,"¹¹⁰ and from this it follows that classifications that disadvantage those "we know to be the object of widespread vilification" should be viewed as suspicious. Some pause for reflection is in order here. First, Ely does not explain why judicial intervention is necessary when the objects of widespread vilification nevertheless have the political ability to wheel and deal in the pluralist arena—and it should be remembered that Ely seems to concede that blacks as a group have this ability.¹¹¹ Second, the "widespread vilification" test can result in curious analysis. Ely observes, for example, that burglars as a group are subject to widespread vilification, but he is quick to note that laws making burglary a crime would obviously satisfy the strictest judicial scrutiny.¹¹² Obviously they would, but are we prepared to accept that such laws should be subject to strict scrutiny in the first place? Even Ely is uneasy, for he soon adds that such laws are not suspicious, "or, if you prefer, the suspicion is immediately allayed," because of the legitimate goal of deterring burglars.¹¹³ The "if you prefer" clause, however, is the crux of the equal protection issue, but Ely buries in a footnote the ramifications of making such a classification suspect. Using strict scrutiny, he tries to defend the constitutionality of denying a license to practice medicine to anyone convicted of burglary,¹¹⁴ but we have reason to wonder whether Ely tempered the strictness of his scrutiny to achieve the necessary result. Ely does not address laws punishing burglars more seriously than some other felons, but if these are to be subject to strict scrutiny, the doors have sprung wide open for the judicial interventionists.¹¹⁵

Even assuming its acceptability, the widespread hostility test is not easily applied. One indicator of such hostility, Ely suggests, is the group's social isolation: "Increased social intercourse is likely not only to diminish the

108. *Id.* at 152.

109. *Id.*

110. *Id.* at 153.

111. See Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1054 n.70 (1980).

112. ELY, *supra* note 5, at 154.

113. *Id.*

114. *Id.* at 250 n.65.

115. Even Professor Tribe seems disinclined to accept Ely's invitation:

Are burglars therefore a "suspect class"? Of course not. Suspect status is unthinkable—but only because of the substantive value we attach to personal security, and the importance for us of the system of private property and its rules of transfer, which the burglary prohibition preserves. If we speak of burglars as a class, we do so as a way of giving form to our view that burglary is a "different" activity, different not so much because burglars visibly define a group as because we disapprove of the activity, deny it any claim to protection as a right.

Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980).

hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype in ways that exaggerate the superiority of those groups to which we belong."¹¹⁶ Ely places the poor in the socially unintegrated group, but he quickly allays any fear that he may be calling for judicial redistribution of wealth:

[F]ailures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms. A theory of suspicious classifications will thus be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with.¹¹⁷

Unfortunately, the matter is not that simple. A legislature comprised of persons who do not mix with the poor may hold the not uncommon view that the poor are poor because they want to be. A legislature that refuses to increase welfare may believe the poor will only squander the money received. A legislature that chooses a fixed over a progressive income tax, or a sales tax over an income tax, may clearly have a "we-they" motivation. The point is not that these laws should be subject to strict scrutiny, but rather that Ely's approach, his protestations notwithstanding, can easily yield such a result. As Ely seems to recognize, although he does not state it, such judicial interventionism would raise grave questions about the judiciary's function in a democratic society.¹¹⁸ Ely's theory, of course, was designed to eliminate such concerns.

Ely has problems applying his test to other groups. He easily finds suspicious classifications on the basis of homosexuality,¹¹⁹ but again he buries in a footnote the difficult issue: the constitutionality of laws that make homosexual conduct criminal.¹²⁰ Even a strict scrutiny test does not help very much if a court must accept as valid the state's belief in the immorality of such conduct, and Ely is not prepared to allow courts to make the value judgment that this moral viewpoint is unacceptable, although he does make a lame attempt to suggest that courts must distinguish a sincere moral objection to homosexuality from a simple desire to injure the parties involved.¹²¹ Ely does

116. ELY, *supra* note 5, at 161.

117. *Id.* at 162.

118. *Cf.* *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)(expressing such concerns and declining to mandate that states restructure their methods of financing public education).

119. ELY, *supra* note 5, at 163–64.

120. *Id.* at 255–56 n.92.

121. *Id.* Ely may not fully realize the ramifications of disallowing the courts to question the moral judgment underlying a statute.

Indeed, even laws putting blacks and women "in their place"—banning racial intermarriage, say, or excluding women from combat—are likely to reflect neither simple hostility nor self-serving blindness but a *substantive vision of proper conduct*—a vision that no amount of attention to flaws in the political process could condemn or correct. [Such laws] can be rejected *only* by finding a constitutional basis for concluding that, in our society, such hierarchical visions are substantively out of bounds

Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1076 (1980) (emphasis in original).

not recognize, however, that if the state can outlaw homosexual conduct, much like it can outlaw burglary, then it should likewise be able to deny practicing homosexuals certain job licenses, much as, in Ely's view, it can deny such licenses to burglars.¹²² If the latter satisfies strict scrutiny, so should the former.

Ely gets into this thicket by refusing to view the equal protection clause as embodying the substantive value of equality, particularly racial equality. While he concedes that the thirteenth amendment embodies the value judgment that slavery is morally evil,¹²³ he prefers to view the equal protection clause as part of his "participation-oriented," "representation reinforcing" scheme. Professor G. Edward White perceptively noted a few years ago that schools of academic thought frequently develop in response to perceived social needs, and that the moral sensibility of scholars is molded by social experience.¹²⁴ For Ely, the perceived social need seems to be racial preference, usually referred to as affirmative action. If the equal protection clause is viewed as the embodiment of a substantive judgment that racial classifications are evil, racial preference policies for minorities are hard (but not impossible) to defend. Ely's approach, however, while uncertain in so many other contexts, produces a clear answer here, and the answer is obviously the one Ely prefers.¹²⁵ The moral issue of affirmative action is wrenching, and Ely's instinct that we should not permanently settle it by extrapolating from moral abstractions articulated in 1868 seems sound. Ironically, Ely's flawed attempt to develop equal protection principles from his own constitutional theory may only convince some that no other approach to affirmative action is possible.

III.

Too much can be made of the criticisms offered in this Article. While Ely has not precluded the possibility of rebuttal to his general theory, and while his application of theory to concrete problems often seems troublesome, the importance of his view that the political arena is generally the place to settle issues of policy and morality should not be underestimated. The contrary view can be nothing less than an attempt to rule future generations from our graves. The abortion issue, as Ely noted in an earlier article,¹²⁶ is on fair consideration, as morally wrenching as the affirmative action issue, and by settling it "constitutionally" rather than by statutory reform we have made it

122. See notes 113-15 and accompanying text *supra*.

Ely's discussion of sex classification is also troubling, and he succeeds only in coming up with a compromise: a statutory classification aimed at women is viewed as suspect depending upon its date of passage. For criticism, see Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1056 & n.84 (1980).

123. ELY, *supra* note 5, at 98.

124. White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

125. ELY, *supra* note 5, at 170-72.

126. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

much more difficult for a future generation effectively to reconsider and express revulsion at our own morality. Ely is right and important in reminding us that such issues are not for constitutions to resolve, and he is right in arguing that the Framers neither attempted to resolve them nor invited the judiciary, of all institutions, to do so. If Ely's book contained nothing but this insight, it would belong among the most significant contributions of our time.

It is difficult to believe that Ely was serious in suggesting that rejection of his alternative model to the fundamental values approach would mean perhaps that courts should avoid altogether the Constitution's open-ended provisions.¹²⁷ Other theories of judicial review are possible: the choice need not be Ely, Tribe, or abdication.¹²⁸ In any event, we should not be too ready to permit the flaws in Ely's analysis to prompt us to seek out other theories. No theory of judicial review can ever be perfect, the most significant reason, earlier discussed,¹²⁹ being the constraining force of precedent, especially precedent entrenched by time and consistent application. Any serious theorist must accommodate rather than seek to abrogate such precedent, and such accommodation will distort both the theory and its application in certain contexts. Moreover, criticism should be tempered by the realization that the debate over the justification and legitimacy of judicial review may be interminable, and properly so. One of our checks and balances—giving us, in Bickel's words, a "nice adjustment between authoritarian judicialism and government by consent"¹³⁰—may be the debate itself, which, being interminable, allows the "nice" ebb and flow of interventionism that different times require.

If Ely cannot infallibly demonstrate that his approach is required by democratic theory, he still has given us a choice between extant theories, all imperfect. Despite its flaws, *Democracy and Distrust* evokes a strong impression that Ely's theory is least imperfect and most in harmony with democratic principles, and the burden of going forward, if not the ultimate burden of persuasion, should now shift to those advocating other theories. Ely may not have built his constitutional structure on a foundation of solid rock, but neither did he build on eroding sand. At the very least, he has set forth an approach, a suggested mood, about constitutional interpretation that, while oftentimes unyielding of clear, black letter principles, will profoundly affect judges who come under its influence. For this, we are in Ely's debt.

127. See note 11 and accompanying text *supra*.

128. See, e.g., Michelman, *Politics and Values or What's Really Wrong with Rationality Review*, 13 CREIGHTON L. REV. 487, 491 (1979), contending that a theory of "social wealth maximization" may be as plausible as Ely's theory of representation reinforcement.

129. See note 40 and accompanying text *supra*.

130. A. BICKEL, *POLITICS AND THE WARREN COURT* 42 (1965).

